Both the statement and the evidence with regard to it were, in my opinion, clearly privileged under section 127 of the Evidence Ordinance and the only question is as to whether the plaintiff had expressly waived it as the learned trial judge found he had. The only material evidence on the subject was that of the plaintiff and this is what he said:

> "Yes, I said I did not make a statement at the Legal Aid Bureau. I did not tell them of the matters stated in two letters from Legal Aid Bureau. I cannot explain why the Director should have written in those terms. If I made a statement to the Legal Aid I would not object to it being produced. In fact I did not make one."

On the face of that evidence, I am unable to construe it as an express waiver by the plaintiff of the privilege and indeed, in my view, it falls short of that express consent of the client which is required before any such disclosure can be made. His counsel objected strongly to the evidence and claimed privilege throughout. I must confess I am unable to see how the plaintiff could be said to expressly consent to the production of a statement which he insists he never made. In any event, I do not think the position was ever made clear to him as to what his position was in the matter or what was required of him.

I have the misfortune to disagree with the learned trial judge and I have come to the conclusion that the plaintiff did not expressly waive the privilege as required by section 127 of the Evidence Ordinance. Furthermore, it would, in my view, have been improper in the circumstances of this case for the trial judge to have compelled the plaintiff to disclose the communication which took place between him and the Legal Aid Bureau under section 130 of the Ordinance.

As the wrongful admission of the evidence constituted, in my opinion, a fundamental error, there must be a new trial. This inadmissible evidence had considerable weight with the learned trial judge and I am quite unable to say that had the evidence been excluded he would have come to the same conclusion.

As there is to be a new trial, the less I say about the evidence the better, but in view of the fact that the learned trial judge in dismissing the plaintiff's claim, stated that he accepted the evidence of the defendant that the accident occurred as the result of his passenger opening the rear nearside door of the car and the plaintiff riding into it, I think I should refer briefly to the defendant's evidence. The defendant never saw the accident at all. He said that the first indication he had that an accident had occurred was a bang and he turned round and found the door open. His evidence was that his female passenger in the rear seat left the car after the accident had taken place, that she took a look and said she wanted to leave and that was after knocking against the cyclist. Later in his evidence he said his passenger did not say she was getting out.

Whether that evidence does or does not support the learned trial judge's finding is a matter on which, I think, I should refrain from expressing any opinion but with the exclusion of the statement it stands entirely alone and accordingly requires the most careful scrutiny and consideration.

In the result, therefore, in my judgment, the appeal must be allowed and there must be a new trial before another judge.

As the whole of the first trial was rendered abortive by the inadmissible evidence tendered by the defendant, the proper order as to costs, in my opinion, is that the plaintiff have the costs of this appeal and if he succeeds in the new trial the costs of the first trial, but the defendant is not to have the costs of the first trial in any event. Deposit to appellant.

Appeal allowed. Retrial ordered.

Solicitors: *Murphy & Dunbar; Hilborne, Chung & Co.*

PUBLIC PROSECUTOR v. TENGKU HITAM

[R. Cr. J. (Hashim J.) October 3, 1962]

[Kuala Trengganu — Criminal Revision No. 6 of 1962]

Criminal Law and Procedure — Trial — Jurisdiction of Magistrate — Imposition of sentence that is more than that specified by law — Adequacy of — Procedure to be adopted — Criminal Procedure Code (Cap. 6), s.173(b) — Courts Ordinance, 1948, s.87(2) — When to be invoked.

Before a case is presented in court the prosecution must first satisfy itself whether the maximum punishment which such court can impose is adequate. If it thinks that such sentence is inadequate the case should be brought before the court which has jurisdiction to try it. For example, a case which is ordinarily triable in a Magistrate's court should be brought in that court and should only be brought in the Sessions Court if the prosecution is of the opinion that upon conviction the maximum sentence which can be imposed by a Magistrate is inadequate. The provisions of section 87(2) of the Courts Ordinance, 1948, should only be invoked when the case takes an unexpected turn and the evidence so adduced shows that the maximum sentence that can be imposed by the trial Magistrate is inadequate.

The sentence of 2 years' imprisonment imposed by the learned Magistrate on a charge under section 406 of the Penal Code altered to that of 12 months.

CRIMINAL REVISION.

Hashim J.: I have called for the record of this case.

The accused was charged under section 406 of the Penal Code. He was found guilty, convicted and sentenced by the learned Magistrate to 2 years' imprisonment to be followed by 6 months' police supervision. According to a note made by the learned Magistrate he enhanced the sentence because it was "appropriate and proper".

Under section 87(1)(a) of the Courts Ordinance, 1948, the maximum sentence which a Magistrate can impose is twelve months' imprisonment. Under section 87(2) he may award

the full punishment authorised by law for the offence of which such person has been convicted and shall record his reason for so doing. Presumably the learned Magistrate now wants me to deal with this case under section 52(2) of the Courts Ordinance, 1948.

In this case the record does not show that the court ascertained that the accused understood the nature and consequences of his plea and intended to admit, without qualification, the offence alleged against him. There is also no record that his plea was accepted by the learned Magistrate before recording a conviction. I invite the attention of all Presidents and Magistrates to the provisions of section 173(b) of the Criminal Procedure Code.

I would suggest that the following procedure be adopted. Before a case is presented in court the prosecution must first satisfy itself whether the maximum punishment which such court can impose is adequate. If it thinks that such sentence is inadequate the case should be brought before another court. Ordinarily a case should be brought before the court which has jurisdiction to try it. For example, a case which is ordinarily triable in a Magistrate's Court should be brought in that court and should only be brought in the Sessions Court if the prosecution is of the opinion that upon conviction the maximum sentence which can be imposed by the Magistrate is inadequate. The provisions of section 87(2) of the Courts Ordinance, 1948 should only be invoked when the case takes an unexpected turn and the evidence so adduced shows that the maximum sentence that can be imposed by the trial Magistrate is inadequate.

In exercise of my powers under section 325(i) of the Criminal Procedure Code, I alter the sentence of the Magistrate to that of 12 months' imprisonment.

Order accordingly.

SOHAN SINGH v. GARDNER & ANOR.

[O. C. J. (Buttrose J.) October 6, 1962]

[Singapore — Suit No. 1292 of 1959]

Moneylending — Outstanding accounts — Collection of, by ex-moneylender — Suit started before new Ordinance came into force — Whether amounting to carrying on business of moneylending under Moneylenders Ordinance, 1959 — Interpretation and General Clauses Ordinance (Cap. 2), s.14.

Contract — Contract between lender and borrower — Allegation of fraud — Onus of proof.

In this action the plaintiff who described himself as an ex-moneylender, claimed against the defendants for the sum of $6,776.19, being the balance of principal and interest due under two promissory notes dated August 29, 1957 and March 28, 1958 and made by the defendants jointly and severally in favour of the plaintiff.

The plaintiff was a moneylender under the Moneylenders Ordinance (Cap. 193) which was repealed by the present Ordinance which came into operation on September 11, 1959. The present proceedings were commenced on September 4, 1959, one week prior to the new Ordinance coming into force.

The plaintiff maintained that he had ceased to be a moneylender as from September 10, 1959, but had merely endeavoured to collect outstanding accounts after that date and had not entered into any new agreements for loans to borrowers.

The defendants contended, on the other hand, that notwithstanding that plaintiff had not lent any money after the coming into force of the new Ordinance, by continuing to collect his outstanding accounts on or after September 11, 1959, he was carrying on the business of a moneylender and the provisions of the new Ordinance applied to him. They maintained he could not seek to recover his money without taking out a licence.

Held: (1) the new Moneylenders Ordinance, 1959, should be construed so as not to interfere or to interfere as little as possible with the rights of the parties as they existed at the time of its passing. Where the action was pending at the time clear and definite words are necessary to alter those rights. Section 14 of the Interpretation and General Clauses Ordinance is in point and to the like effect;

(2) the plaintiff is not a moneylender within the meaning of the Moneylenders Ordinance, 1959.

There were also some difficult issues of fact. The substantial questions which arose to be considered by the Court were as to what was the real contract between the parties and whether it was truly and fully set out in the promissory notes, whether copies of notes were given to the defendants and whether the notes had been discharged by payment in full.

The defendant pleaded fraud and alleged that the promissory notes themselves did not correctly set out either the agreement reached, the amounts of the loans or the interest payable.

Held: the defendants by their signature to the promissory notes and the acknowledgments attached to them had acknowledged receipt jointly of the monies lent and the onus was therefore upon them to show that these did not set out the terms of the real contract. Furthermore, they had alleged fraud which must not only be pleaded with utmost particularity but must be clearly and distinctly proved. This the defendants had failed to do.

Cases referred to:—

(1) *Pandey* v. *Stephen* [1960] M.L.J. 69.

(2) *Tara Singh* v. *Ho Nuet Hong* [1961] M.L.J. 278.

(3) *Bachan Singh* v. *Kulasingah* [1962] M.L.J. 22.

(4) *Surain Singh* v. *Yatim Eusope* [1962] M.L.J. 223.

ACTION.

K. K. Bezboruah for the plaintiff.

H. E. Cashin for the defendants.

Cur. Adv. Vult.

Buttrose J.: In this action the plaintiff, who described himself as an ex-moneylender, claims against the defendants for the sum of $6,776.19, being the balance of principal and interest due under two promissory notes for $2,200 dated the 29th August, 1957, and $3,750 dated the 28th March, 1958, respectively and made by the defendants jointly and severally in favour of the plaintiff.

The plaintiff's case was that the amounts stated in the promissory notes were actually